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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NICOLE T.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Real Party in Interest.

D044377

(San Diego County  
Super. Ct. No. J 515102)

PROCEEDINGS in mandate after reference to a Welfare and Institutions Code section 366.26 hearing (all statutory references are to the Welfare and Institutions Code unless otherwise specified). Julia Kelety, Judge. Petition denied.

The San Diego County Health and Human Services Agency (HHSA) took newborn Melanie T. into protective custody because her mother, Nicole T. left the hospital following her birth and could not be located. Further, the mother did not have prenatal care, had been homeless for a year, and was accompanied at the hospital by her boyfriend, who exhibited bizarre behaviors. At the six-month review hearing, the juvenile court terminated services and set a section 366.26 permanency planning hearing. The court also denied Nicole's request that Melanie be placed with her maternal aunt, Christina S.

Nicole seeks writ review (§ 366.26, subd. (I); Cal. Rules of Court, rule 39.1B), challenging the court's refusal to place Melanie with Christina. We issued an order to show cause, HHSA responded, and the parties waived oral argument. We review the petition on the merits and deny it.

#### PROCEDURAL AND FACTUAL BACKGROUND

In July 2003 Nicole gave birth to Melanie. The following day, Nicole was detained in a licensed foster home. On July 30 HHSA filed a dependency petition alleging Melanie was at substantial risk of serious harm because Nicole was unable to provide her the necessities of life; the petition cited Nicole's lack of prenatal care, her leaving the hospital after birth and her subsequent failure to contact the social worker. (§ 300, subd. (b).)

Nicole, who continued to be homeless, attended the July 30 detention hearing as did her sister, Christina, and the maternal grandmother, Donna S. Donna told the social

worker that she wanted her home evaluated for placement of Melanie. Nicole said she wanted Melanie placed with Donna or Christina.

Nicole did not attend the contested jurisdictional/dispositional hearing on September 22, when the court sustained the petition, placed Melanie in a licensed foster home and ordered reunification services. The court also found there was not a relative available to care for Melanie. Christina, who had asked the social worker to set up visits with Melanie, attended the hearing, as did Donna, the maternal grandmother.

In December Nicole was convicted of vehicle theft and sentenced to 16 months in prison. Up to that time, Nicole had never visited Melanie or contacted HHSA to inquire about Melanie.

The social worker reported to the court that Donna and Christina had expressed an interest in having Melanie placed with them, but neither had living arrangements that could accommodate Melanie. In March 2004 Donna and Christina rented an apartment together so that HHSA would consider them as a placement for Melanie. Also living in the apartment was Christina's son, who was almost one year old. Donna took care of the boy while Christina worked at her full-time job; they anticipated the same child care arrangement for Melanie if she were placed with them.

HHSA recommended against placing Melanie with Donna and/or Christina. During a two-year period in the 1990s, Donna had one felony theft conviction and three misdemeanor convictions. Donna also had a history of several child protective service referrals from 1992 to 1997, including several that involved Christina being molested by older men. Christina, who was 20 years old when HHSA evaluated her, admitted she was

molested; however, Christina insisted that the molestations no longer presented issues for her because she had three years of counseling and successfully resolved those issues.

HHSA also pointed out that Christina had not regularly visited Melanie, noting that in nine months Christina visited her niece only six times.

At the contested six-month review hearing on May 21, 2004, Christina testified she would be willing to adopt Melanie and was confident she would be able to protect the child. Christina admitted she had visited Melanie only six times, but said she tried to arrange more visits. Christina also said that when the social worker evaluated her apartment she said it "was very neat and clean . . . [t]hat we did have things for Melanie, but they had already basically ruled us out." The reason was "'due to my mother's history and my age.'" Nicole's attorney told the court that if reunification services were terminated she wanted Melanie placed with Christina. The attorney also said if the court eventually ordered adoption as a permanent plan, Nicole would want Christina to adopt Melanie.

After finding (1) HHSA had offered reasonable services to Nicole, (2) Nicole had not made substantive progress with her case plan, and (3) returning Melanie to her would present a substantial risk of detriment to the child, the court terminated services and set a section 366.26 permanency planning hearing. The court also denied the request by Nicole and Christina that Melanie be placed with Christina, and approved the de facto parent application of Melanie's foster parents, who had cared for her since she was one day old.

## DISCUSSION

Nicole contends the court abused its discretion in not placing Melanie with Christina because she met most of the criteria in section 361.3, "which requires preferential placements for relatives of dependent children." We disagree.

Section 361.3 requires the social worker and the court to give preferential consideration to relatives seeking placement of a child; the statute does not require preferential placements for relatives. Preferential consideration under the statute "does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining placement in the child's best interests." (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 286.)

Moreover, section 361.3 applies to two situations—at the dispositional hearing when the child is removed from parental custody (*id.* subd. (a)), and when "a new placement must be made" (*id.* subd. (d); see also *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032).

Relatives who timely request placement of a dependent child are given preferential consideration based on various factors. (§ 361.3, subd. (a).) The statutory factors under section 361.3 include the child's best interest, the parents' and relative's wishes, the good moral character of the relative and any other adult living in the home, the nature and duration of the relationship between the child and the relative, the relative's desire to provide legal permanency for the child if reunification fails, and the relative's ability to protect the child from her parents. (§ 361.3, subd. (a)(1)-(8).) When a placement is no

longer viable, the court can also consider whether the relative seeking placement has established and maintained a relationship with the child. (§ 361.3, subd. (d)).

At the September 2003 dispositional hearing, Melanie was placed in the licensed foster home where she has lived since one day after her birth; hence, Christina's request to have Melanie placed with her was made well past the child's removal from parental custody and did not warrant preferential consideration under section 361.3, subdivision (a). Christina's request also not did not warrant preferential consideration under section 361.3, subdivision (d) because there was no need to change Melanie's placement. Melanie was in good health, displayed no developmental delays and appeared to be happy in the placement. We conclude the statutory preference given to considering relatives for placement under section 361.3 was not properly at issue.

Of course, a relative can seek placement of a dependent child who is in a still-viable placement, as Christina did here. In such cases, the overriding inquiry is whether the change in placement is in the child's best interests. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 320-321.) Further, in determining whether a relative placement is in the child's best interests, the court may consider the criteria listed in section 361.3, subdivisions (a) and (d).

We review the court's placement orders under the abuse of discretion standard of review; the court is given wide discretion and its determination will not be disturbed absent a manifest showing of abuse. (*In re Sarah S.*, *supra*, 43 Cal.App.4th at p. 286.)

We conclude the court was well within its discretion in denying Christina's request for placement. In evaluating Christina and Donna, HHSA discovered that Christina, as a

child, was a victim of molestations by older men, and Donna had a child protective services history, including the molestation incidents involving Christina. Donna also had a criminal history. Donna's history is significant because she lived with Christina and the household was set up to have Donna provide child care for Melanie for eight hours a day. Further, Christina had not regularly visited Melanie. At the time of the contested hearing in May 2004, Melanie was 10 months old and had lived in the foster home her entire life. The court reasonably could find that it was in Melanie's best interests to remain in a stable placement at that time. "[T]he fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected." (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 321.) Under these circumstances, we cannot say the court abused its discretion in denying the requests to have Melanie placed with Christina.

#### DISPOSITION

The petition is denied.

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McINTYRE, J.

WE CONCUR:

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McCONNELL, P. J.

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IRION, J.